SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* VERNON WATTS

UNITED STATES *v.* CHERYL PUTRA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95–1906. Decided January 6, 1997

JUSTICE KENNEDY, dissenting.

A case can be made for summary reversal here, based on such factors as the conflict between the rationale of the Court of Appeals for the Ninth Circuit and the rationale of this Court in *Williams* v. *New York*, 337 U. S. 241 (1949), and, to a lesser extent, in *Witte* v. *United States*, 115 S. Ct. 2199 (1995); the conflict the Ninth Circuit created, without considering *en banc* its departure from the rule followed in all other circuits; and the lack of any clear authority to constrain the sentencing judge as the Court of Appeals seeks to do.

On the other hand, it must be noted the case raises a question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system. We have not decided a case on this precise issue, for it involves not just prior criminal history but conduct underlying a charge for which the defendant was acquitted. At several points the per curiam opinion shows hesitation in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted. The distinction ought to be confronted by a reasoned course of argument, not by shrugging it off.

At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal, concerns noted by Justice Stevens and the other federal judges to whom he

refers in his dissent. If there is no clear answer but to acknowledge a theoretical contradiction from which we cannot escape because of overriding practical considerations, at least we ought to say so. Finally, as Justice Stevens further points out, the effect of the Sentencing Reform Act of 1984 on this question deserves careful exploration. This is illustrated by the fact that Justices Scalia and Breyer each find it necessary to issue separate opinions setting forth differing views on the role of the Sentencing Commission.

For these reasons the case should have been set for full briefing and consideration on the oral argument calendar. From the Court's failure to do so, I dissent.